BEFORE THE MERIT EMPLOYEE RELATIONS BOARD

OF THE STATE OF DELAWARE

JOY D'SOUZA, Employee/Grievant, v. DEPARTMENT OF SERVICES FOR CHILDREN, YOUTH AND THEIR FAMILIES, Employer/Respondent.	)	**DOCKET No. 12-06-547** **DECISION AND ORDER**

After due notice of time and place this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:00 a.m. on December 6, 2012 at the Commission on Veterans Affairs, Robbins Building, 802 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Dr. Jacqueline Jenkins, Acting Chair, John F. Schmutz, Victoria D. Cairns, and Paul R. Houck, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

W. Michael Tupman
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Laura L. Gerard
Deputy Attorney General
on behalf of the Department of Services for Children, Youth and Their Families

Joy D'Souza
Employee/Grievant *pro se*

BRIEF SUMMARY OF THE EVIDENCE

The Board heard legal argument on the motion by the Department of Services for Children, Youth and Their Families (DSCYF) to dismiss the appeal of the employee/grievant, Joy D'Souza (D'Souza), for lack of jurisdiction and/or failure to state a claim upon which relief can be granted as a matter of law.

DSCYF attached to its motion to dismiss: Step Three Grievance Decision dated May 14, 2012 (Exh. A); Merit Rule Appeal to the MERB (received by the Board on June 4, 2012) (Exh. B); and e-mail dated June 14, 2012 from Karen R. Smith to D'Souza and Letter of Instruction dated September 2, 2011 (Exh. C). The Board asked for and admitted into evidence: Written Reprimand dated July 29, 2011 (Exh. D); Performance Review for the period January 2011 – June 2011 (Exh. E); and Written Reprimand dated July 3, 2012 (Grievant's Exh. 1).

FINDINGS OF FACT

The Board makes the following findings of jurisdictional facts.

D'Souza is a Family Crisis Therapist in the Division of Prevention and Behavioral Health Services. She works at Lake Forest North Elementary School in Felton, Delaware.

On July 29, 2011, DSCYF issued D'Souza a written reprimand for violating the agency's Confidentiality Policy #205. According to the agency, D'Souza breached the Confidentiality Policy by sharing information about a client with the child's maternal grandmother without parental permission.

D'Souza grieved the written reprimand. After D'Souza filed her grievance, the agency acknowledged that she had obtained consent from the client's biological father (who had legal custody of the child). However, the agency still believed a written reprimand was appropriate because the conversation between D'Souza and the grandmother took place in an open office

environment.

In a Step 3 decision dated May 14, 2012, the hearing officer modified the written reprimand to a "letter of instruction."

By e-mail dated June 14, 2012, the Division advised D'Souza "that in accordance with the Step III grievance decision issued on May 14, 2012 the written reprimand dated July 29, 2011 was removed from Ms. D'Souza's Human Resource file. . . . Also, the letter of instruction will not be included in Ms. D'Souza's official Human Resource file."

The Letter of Instruction warned that: "Any subsequent breach of confidentiality or violation of any agency policy will result in progressive disciplinary action up to and including termination."

D'Souza had a mid-year performance evaluation for the period January – June 2011. Under "Areas of specific performance deficiencies or unsatisfactory work" the evaluation referred to D'Souza's disclosure of confidential information about a client without parental consent. The evaluation was not signed and there was no overall rating. According to DSCYF, it does not include mid-year evaluations in the employee's personnel file because they are merely verbal counseling.

On July 3, 2012, DSCYF issued a written reprimand to D'Souza for "inappropriate communication and violation of the [Department of Technology and Information] Acceptable Use Policy (Unauthorized or inappropriate mass distribution of communication)." The written reprimand referenced a June 17, 2011 counseling session which led to D'Souza's July 29, 2011 written reprimand for violating the agency's Confidentiality Policy.

A majority of the Board finds as a matter of fact that the Letter of Instruction was not a disciplinary measure.

The Board finds as a matter of fact that D'Souza's June 2011 informal performance

evaluation did not adversely affect her status as a Family Crisis Therapist.

CONCLUSIONS OF LAW

A. 2011 Mid-Year Performance Evaluation

Merit Rule 13 (Performance Review) does not provide a right to appeal a performance evaluation. However, the Merit Statutes authorize a classified employee to grieve "an alleged wrong that affects his or her status in his or her present position." 29 *Del. C.* §5943(a).

D'Souza's mid-year performance evaluation "did not have any adverse effect on her position." *Olsen v.* DSCYF, MERB Docket No. 11-04-518, at p.3 (Mar. 5, 2002). *Accord Bloom v. DHSS*, Docket No. 12-02-537 (July 24, 2012) (grievant did not have standing to appeal a needs improvement performance evaluation). The Board concludes as a matter of law that it does not have jurisdiction to hear D'Souza's appeal of her 2011 mid-year performance evaluation.

B. Letter of Instruction

Merit Rule 12.1 only applies to "disciplinary measures." The Board has previously held that it "does not have jurisdiction to decide a grievance over a verbal reprimand" because "a verbal reprimand [does not] amount to a disciplinary measure under Merit Rule 12.1." *Danneman v. DHSS*, MERB Docket No. 08-10-429, at p. 4 (Apr. 22, 2009) (quoting *Trader v. DHSS*, MERB Docket No. 07-01-379, at p.5 (May 15, 2008)).

The Board must decide whether D'Souza's letter of instruction is more in the nature of a written reprimand or a verbal reprimand or counseling.

In *Tapia v. City of Albuquerque*, 170 Fed.Appx 529, 2006 WL 308267 (10th Cir., Feb. 10, 2006), a supervisor gave a city employee (Oliver Tapia) "a letter of instruction directing him not to make verbal threats to employees. The letter warned that future disciplinary action was possible if Tapia made another threat." 2006 WL 308267, at p.2. The employee claimed the letter of

instruction was an adverse employment action because the supervisor placed it in his personnel file and it could affect his future employment. The letter of instruction, however, "was not disciplinary. It did not affect his pay, benefits, or employment status. . . The fact that the letter indicates that Tapia could be disciplined for a future threat is not enough to make the letter itself disciplinary action." 2006 WL 308267, at p.4.

A majority of the Board concludes as a matter of law that D'Souza's letter of instruction was not a disciplinary measure and therefore the Board does not have jurisdiction over her appeal. The letter of instruction (which was not placed in her personnel file) memorialized her verbal counseling. Even though the letter of instruction was not a part of D'Souza's personnel file, the agency could cite it as a basis for a written reprimand one year later for similar misconduct to show that D'Souza was aware of the agency's expectations for appropriate behavior in the workplace.

C. Disparate Treatment

D'Souza claims that her supervisor discriminated against her by requiring her to justify and obtain prior approval before transporting a client to Wilmington. According to the agency, this was necessary because D'Souza kept exceeding the agency's policy of no more than five transports per month.

D'Souza did not provide the Board with any evidence to show that her supervisor allowed other Family Crisis Therapists to transport clients more than five times per month without imposing the same restrictions on them. The only evidence she provided the Board were three e-mails from co-workers. The Board's legal counsel reviewed the three e-mails and advised the Board that one co-worker merely acknowledged that he had transported clients in the past (how often, he did not say), and two co-workers said they never transported clients.

D'Souza claimed that she had evidence of other examples of disparate treatment by her supervisor which she attached to her appeal to the Board. The Board's legal counsel reviewed the

attachments and advised the Board that they did not contain any evidence of disparate treatment. D'Souza may have had a number of issues with her supervisor, but she could not make a proffer of proof to the Board of any disparate treatment of similarly situated comparators.

The Board concludes as a matter of law that D'Souza failed to allege sufficient facts to state a claim of disparate treatment. [1]

DECISION AND ORDER

It is this **20th** day of December, 2012, by a vote of 3-1, the Decision and Order of the Board to dismiss D'Souza's appeal for lack of jurisdiction and/or failure to state a claim upon which relief can be granted as a matter of law.

JACQUELINE D. JENKINS, EDD, MERB Member

JOHN F. SCHMUTZ, MERB Member

VICTORIA D. CAIRNS, MERB Member

I concur in Parts A. and C. of the majority opinion but respectfully dissent as to Part B.

PAUL R. HOUCK, MERB Member

[1] According to D'Souza, she did not want to name co-workers as witnesses for her disparate treatment claim because she feared the agency might retaliate against them. According to the agency, D'Souza has a pending charge of discrimination with the Equal Employment Opportunity Commission. The Board is confident that the EEOC has the resources and the expertise to deal with any retaliation issues in the course of its investigation.

APPEAL RIGHTS

29 *Del. C.* §5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof on any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court must be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 *Del. C.* §10142 provides:

> (a) Any party against whom a case decision has been decided may appeal such decision to the Court.
>
> (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
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> (c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.
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> (d) The court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing date: **December 20**, 2012

Distribution:
Original: File
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Agency's Representative
Board Counsel
HRM/OMB

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